UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

NextEra Energy, Inc. and NextEra Energy Partners, L.P., Complainants, v. Pacific Gas & Electric Co., Respondent.	))))))))))	Docket No. EL19-35-000

ANSWER OF PACIFIC GAS AND ELECTRIC COMPANY

Pacific Gas and Electric Company ("PG&E") submits this Answer to the Petition for Declaratory Order and Complaint ("Complaint") filed on January 18, 2019, by NextEra Energy, Inc. and NextEra Energy Partners, L.P. (collectively, "NextEra"). NextEra's filing asks the Federal Energy Regulatory Commission ("FERC" or the "Commission") to intercede prior to a bankruptcy filing to limit PG&E's rights in any such proceeding. Such an order would violate both the Federal Power Act[1] ("FPA" or "Federal Power Act") and the Bankruptcy Code and also would contravene the terms of the agreements between NextEra and PG&E.[2] The Complaint should therefore be denied.

BACKGROUND & EXECUTIVE SUMMARY

NextEra and several of its subsidiaries are public utilities that sell electricity at wholesale pursuant to market-based rate tariffs on file with the Commission. PG&E is a customer of NextEra

---

[1] 16 U.S.C. §§ 791a–825r.

[2] 11 U.S.C.

under numerous power purchase agreements ("PPAs").[3] On January 14, 2019, in accordance with California law,[4] PG&E provided advance notice that it intends to file petitions to reorganize under Chapter 11 of the Bankruptcy Code on or about January 29, 2019. In response to this notice, NextEra filed the Complaint seeking an order prohibiting PG&E from rejecting any of the NextEra PPAs in bankruptcy proceedings without first receiving Commission approval. The Commission should reject the Complaint for three reasons.

First, the FPA and Commission rules bar this complaint. The Complaint alleges only hypothetical harm. No bankruptcy has occurred; no action has been taken to reject these contracts. Indeed, no decision has been made with respect to the timing of any decision on whether to assume or reject contracts at issue here, much less a decision to assume or reject any particular contract. While PG&E may take action to ensure that any rejection motion is resolved in the bankruptcy court, any such decision about rejection would ultimately require careful consideration of energy needs, as well as any procurement requirements or policy guidance, as may be applicable, from the California Public Utilities Commission ("CPUC") or others. As a result, any harm to NextEra is purely speculative. The Commission routinely denies complaints based solely on the risk for future harm and should do so here.

Moreover, NextEra's filing seeks a result that conflicts with the central purpose of the FPA—protection of customers in transactions involving wholesale electricity sales. The FPA provides the Commission jurisdiction over the *sale* of power, not its purchase. As a result, the

[3] Copies of the relevant PPAs have been filed with the California Public Utilities Commission. Those filed copies with redactions for commercially sensitive or confidential information are attached as Exhibits, namely: Exhibit A (Desert Sunlight Holdings, LLC); Exhibit B (Shafter Solar, LLC); Exhibit C (Genesis Solar, LLC); Exhibit D (Westside Solar, LLC); Exhibit E (Vasco Winds, LLC); Exhibit F (North Sky River Energy, LLC); Exhibit G (FPL Energy Montezuma Wind, LLC); and Exhibit H (NextEra Energy Montezuma Wind II, LLC).

[4] *See* Cal. Pub. Util. Code § 854.2(d).

Commission has jurisdiction over the seller, but not the buyer, in wholesale transactions. Neither the FPA nor Commission precedent authorizes the Commission to order a buyer to continue to purchase power—the relief sought here.

NextEra's theory to the contrary would result in an unprecedented and significant expansion of the Commission's authority. If the Commission asserts jurisdiction over bankruptcy filings that seek to terminate the types of agreements at issue in NextEra's Complaint, it will take on a project of unimaginable scope. PPAs of this kind have become common between entities like NextEra and customers seeking renewable energy, including many Fortune 500 companies. An assertion of jurisdiction here would commit the Commission to interceding in a wide range of corporate bankruptcies spanning multiple sectors of the economy and would threaten the movement toward corporate PPAs.

Second, the bankruptcy court will have jurisdiction over the issues raised in the Complaint if PG&E does ultimately seek rejection of NextEra's PPAs. The Bankruptcy Code speaks with specificity concerning the types of obligations that cannot be discharged in bankruptcy, and PPAs are not among the obligations listed. Nothing in the FPA suggests otherwise. That is because the rejection of a contract in bankruptcy is nothing more than a simple breach of contract. NextEra does not argue, and there is no precedent to support the argument, that the Commission has exclusive jurisdiction over all breaches of PPAs, or that a party must obtain Commission permission before it is able to breach a PPA.

NextEra points to the Commission's exclusive authority to set wholesale rates and the terms and conditions of wholesale contracts, as recognized by the filed-rate doctrine. But a party does not violate the filed-rate doctrine by breaching a contract. To the contrary, a breach-of-contract claim is premised on the integrity of the filed rate. The failure to perform is a breach only

because there is a FERC-approved performance obligation that is going unfulfilled; and that breach entitles the aggrieved counterparty to expectancy damages based on the FERC-approved rate.

Accordingly, in the only Court of Appeals decision to address this issue, *In re Mirant Corp.*,[5] the court concluded that, just as any party can breach a wholesale power contract without Commission approval, so too may a debtor reject wholesale power contracts in bankruptcy without obtaining Commission approval.[6] In its most recent order on the issue, the Commission endorsed that position and followed *Mirant*.[7] And just last year, in *In re FirstEnergy Solutions Corp.*,[8] the Northern District of Ohio Bankruptcy Court reaffirmed that conclusion in connection with the FirstEnergy Solutions ("FirstEnergy") bankruptcy when considering an attempt to reject a contract between FirstEnergy and the Ohio Valley Electric Corporation.[9]

PG&E is aware that the Commission is pursuing an appeal to the U.S. Court of Appeals for the Sixth Circuit in the *FirstEnergy* litigation. In that litigation, the Commission has taken the position that it possesses "concurrent" jurisdiction with the bankruptcy court and that review under the *Mobile-Sierra* doctrine[10] is required prior to rejecting the contract at issue in bankruptcy.[11] Despite that litigation position, unless and until the Sixth Circuit agrees, the Commission should

[5] 378 F.3d 511 (5th Cir. 2004).

[6] *Id.* at 519–20.

[7] *See Cal. Elec. Oversight Bd. v. Calpine Energy Servs.*, 114 FERC ¶ 61,003, at PP 11–14 (2006).

[8] Nos. 18-50757, 18-05021, 2018 WL 2315916 (Bankr. N.D. Ohio May 18, 2018).

[9] *Id.* at *6.

[10] *See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

[11] *See* Defendant Federal Energy Regulatory Commission's Opposition to the Plaintiff's Motion for a Preliminary Injunction at 7–9, 16, *In re FirstEnergy Solutions Corp.*, 2018 WL 2315916 (Bankr. N.D. Ohio) (No. 18-05021) (filed Apr. 30, 2018) [hereinafter FERC *FirstEnergy* Brief].

defer to the overwhelming precedent to the contrary—including its own order in *California Electricity Oversight Board v. Calpine Energy Services*[12]—and deny NextEra's Complaint.

Third, even under the Commission's position in *FirstEnergy*, the Complaint should still be denied because of the language of the contracts at issue here. In its briefing in *FirstEnergy*, the Commission emphasized that *Mobile-Sierra* gave the Commission a special role in ensuring that any contract rejection was consistent with the public interest. Here, however, the parties to the PPAs either declined to apply *Mobile-Sierra* or waived the right to make the type of Commission filing that is contemplated in the Complaint. As a result, the interests at issue in *FirstEnergy* are simply absent in this proceeding, and even if the Commission believes it has jurisdiction over the agreement in *FirstEnergy*, it should disclaim jurisdiction here in light of the language of these agreements.

Alternatively, assuming the Commission believes it has concurrent jurisdiction, it should follow its usual path involving contractual disputes of this nature and decline to exercise it. None of the three factors that the Commission traditionally considers in deciding whether to resolve a contractual dispute favor taking jurisdiction here.[13] This matter does not require interpreting any technical terms of art or otherwise need the Commission's expertise. A Commission decision is not needed to generate uniformity. In fact, as result of the precedent indicating that jurisdiction lies in the bankruptcy court, a Commission decision taking jurisdiction would disrupt a settled consensus in the law. Finally, this case is not important to the Commission's regulatory responsibilities because it is, at most, a simple commercial dispute—and one that may never come to pass as it is possible that neither the PPAs at issue in the Complaint, nor any other PPAs, will

[12] 114 FERC ¶ 61,003 (2006); *see id.* at PP 11–15.
[13] *See Ark. La. Gas Co. v. Hall*, 7 FERC ¶ 61,175, 61,322, *reh'g denied*, 8 FERC ¶ 61,031 (1979).

be the subject of a rejection motion in the bankruptcy court.

ARGUMENT

I. THE COMPLAINT IS BARRED BY THE COMMISSION'S RULES AND THE FEDERAL POWER ACT

A. The Complaint Fails to Meet the Requirements of the Commission's Rules.

The Complaint here must be dismissed because NextEra fails to allege any injury.[14] Commission Rule 206(a) requires NextEra to allege that PG&E acted or failed to act "in contravention or violation of" some provision administered by the Commission,[15] while Rule 206(b) mandates that the Complaint "[c]learly identify the action or inaction which is alleged to violate" the applicable statute or regulation.[16] NextEra has not, and could not, meet that standard. NextEra alleges PG&E might have the "option" to avoid these contracts in bankruptcy, and there is a "risk" PG&E "could" do so.[17] The Commission routinely dismisses complaints based on the speculative risk of future harm.[18]

---

[14] In four of the PPAs, NextEra expressly limited its right to file a Section 206 proceeding at the Commission. *See* Exhibit B § 10.16 (Shafter Solar, LLC); Exhibit C § 1.12(b) (Genesis Solar, LLC); Exhibit D § 10.16 (Westside Solar, LLC); Exhibit G § 10.15(b) (FPL Energy Montezuma Wind, LLC). For those four entities, the Complaint must be dismissed for that reason alone.

[15] 18 C.F.R. § 385.206(a).

[16] *Id.* § 385.206(b)(1).

[17] Compl. at 2–3.

[18] *NextEra Energy Res., LLC v. ISO New Eng. Inc.*, 156 FERC ¶ 61,150, at P 16 (2016) (dismissing a NextEra complaint where the "allegations are speculative and the complaint lacks sufficient evidence of harm"); *Mich. Elec. Transmission Co. v. Midcontinent Indep. Sys. Operator, Inc.*, 156 FERC ¶ 61,025, at P 16 (2016) (dismissing a complaint based on the possibility of future litigation as speculative and lacking sufficient evidence of harm); *CSOLAR IV S., LLC v. Cal. Indep. Sys. Operator Corp.*, 142 FERC ¶ 61,250, at P 42 (2013) (dismissing a complaint as unripe where the harm was based on mere "business risk").

Nor does Rule 207 provide a basis for the pleading here.[19] As with its practice with respect to complaints, the Commission also refuses to issue declaratory orders in situations where the potential harm or controversy is purely speculative. As just one example, the Commission has refused to declare in advance that certain actions that might occur in a bankruptcy proceeding would be inconsistent with the FPA because it was "impossible to know" what might actually develop during the bankruptcy proceeding.[20]

Moreover, and as the Commission's own guidance explains, "pleadings filed in the form of petitions for declaratory orders which seek more than a mere interpretive ruling" should be "treated, instead, as formal complaints."[21] The relief sought here—an order forbidding a specific party to take specified actions in a separate proceeding before another tribunal that has not yet been initiated—resembles the sort of fact-specific injunctive relief that the Commission is without power to enforce itself[22] and goes well beyond the appropriate limits of declaratory relief.[23]

NextEra also ignores the reality that "the ability of interested persons to comment on the issues raised" is "[e]ssential to the declaratory order process."[24] The need for notice and adequate

---

[19] NextEra also appears to have failed to pay the mandatory filing fee for declaratory relief under Commission Rule 207. *See* 18 C.F.R. § 381.302(a); *id.* § 385.207(c).

[20] *Comm. of Certain Members of Cajun Elec. Power Coop., Inc.*, 87 FERC ¶ 61,129, 61,509 (1999); *see also Camille E. Held*, 57 FERC ¶ 61,080, 61,293 (1991) (declining to issue a declaratory order where "the controversy alleged is purely speculative").

[21] *Application/Petition Definitions*, FERC, https://elibrary.ferc.gov/idmws/help/Index.htm #Definitions/Sub_Definitions/Submittal/Applicaiton_Petition_Definitions.htm (last visited Jan. 22, 2019).

[22] *See Tenneco Inc.*, 7 FERC ¶ 61,258, 61,539 (1979) ("We have no power to enforce an injunction. That is for the courts and for them alone.").

[23] *See, e.g.*, *Hollister Ranch Owners' Ass'n v. FERC*, 759 F.2d 898, 903 (D.C. Cir. 1985) (noting that agencies should "issue declaratory orders only to 'terminate a controversy or remove uncertainty'" and should not do so where declaratory relief would "exacerbate uncertainty by placing matters in a 'peculiar, uncertain limbo'" (first quoting 5 U.S.C. § 554(e), then quoting *Tenn. Gas Pipeline Co. v. FPC*, 606 F.2d 1373, 1380 (D.C. Cir. 1979))).

[24] *Obtaining Guidance on Regulatory Requirements*, 123 FERC ¶ 61,157, at P 20 (2008).

time to respond is particularly critical here given that the relief NextEra seeks could have a substantial impact on other parties to a PG&E bankruptcy proceeding. As PG&E has not yet filed for bankruptcy, these entities may not even know of their interest in this proceeding, and a hasty ruling without their input could deny them due process.[25]

B. The Commission Cannot Order Customers to Purchase Power.

Even if NextEra's Complaint were properly pleaded, the Commission could not grant the Complaint because it cannot provide the relief sought. Under the FPA, the Commission lacks the authority to order anyone to purchase electricity.

NextEra seeks an order from the Commission declaring that under the FPA, PG&E may not cease purchasing power under these energy contracts through rejection in bankruptcy proceedings. Such an order would contravene the plain text of the FPA, which gives the Commission authority only over *sellers* and *sales*, not over *purchasers* and *purchases*. The FPA is designed to protect purchasers of electricity by regulating "the business of . . . *selling* electric energy."[26] Accordingly, in enacting the Part II of the FPA, Congress vested FERC with authority to regulate the "transmission" and "sale" of electric energy but not its *purchase*.[27] FPA Sections 205 and 206 are written with a particularly distinctive focus on energy sellers: Under those sections, FERC has extensive authority to review the rates and conditions of electricity "sales," but not of electricity purchases.[28] As the "entire thrust of Part II [of the FPA] is toward the seller

---

[25] *See, e.g.*, *Golden Grain Macaroni Co. v. FTC*, 472 F.2d 882, 885–86 (9th Cir. 1972).

[26] 16 U.S.C. § 824(a) (emphasis added); *see, e.g.*, *Market-Based Rates for Wholesale Sale of Elec. Energy*, 119 FERC ¶ 61,295, at P 6 (2007) ("The Commission's first and foremost duty is to protect customers from unjust and unreasonable rates . . . .").

[27] 16 U.S.C. § 824.

[28] *See* 16 U.S.C. §§ 824d, 824e.

at wholesale, not the buyer,"[29] the statute simply cannot be read to endow the Commission with jurisdiction to regulate electricity purchasers.[30]

Consistent with the plain language of FPA Sections 205 and 206, the Commission has disclaimed authority to regulate purchases and purchasers. In *Midwest Independent Transmission System Operator, Inc.*,[31] for example, the Commission explained that although it "is charged with" regulating sales, state commissions bear responsibility for regulating purchases.[32] Similarly, in *Standards of Conduct for Transmission Providers,*[33] FERC restricted its regulation of conduct to "to include only sales, rather than purchases" in an effort to "more closely match[]" the language of the FPA.[34] FERC has also ruled that the identity of the purchasing party to an energy transaction is irrelevant to the Commission's jurisdiction, which is determined solely by reference to "[t]he identity of the seller."[35]

Importantly, FERC has *never* exercised jurisdiction to require an electricity purchaser to continue to purchase electricity while in bankruptcy. Indeed, the one occasion on which the Commission has ordered specific performance under an electricity contract despite rejection in

[29] Brief for Respondent Federal Energy Regulatory Commission at 36, *E. Ky. Power Co-op, Inc. v. FERC*, 489 F.3d 1299 (D.C. Cir. 2007) (No. 06-1003) (alteration in original) (quoting *Cal. Elec. Power Co. v. FPC*, 199 F.2d 206, 209 (9th Cir. 1951)); *accord E. Ky. Power Co-op*, 489 F.3d at 1306.

[30] *See, e.g.*, *Halverson v. Slater*, 129 F.3d 180, 185–86 (D.C. Cir. 1997) (discussing *expressio unius* canon).

[31] 113 FERC ¶ 61,081 (2005).

[32] *Id.* at P 53.

[33] 125 FERC ¶ 61,064 (2008).

[34] *Id.* at P 77.

[35] *Prior Notice & Filing Requirements Under Part II of the FPA*, 64 FERC ¶ 61,139, 61,986 (1993).

bankruptcy—*Blumenthal v. NRG Power Marketing, Inc.*[36]—illustrates just how inappropriate exercising jurisdiction over a customer like PG&E would be here. In the *NRG* proceeding, the Commission ordered performance on the part of an electricity *seller*,[37] and FERC pointed out that its actions were necessary under the circumstances to fulfill its mandate under the FPA to "*protect* wholesale power *customers*."[38] By exercising jurisdiction over PG&E here, the Commission would turn that mandate on its head by using it to justify *harming* a customer for the sole benefit of a regulated electricity *seller*. Neither the text of the FPA nor its purpose can be reconciled with such a result.

Procedurally, NextEra's Complaint purports to rest on Sections 206 and 306 of the FPA, but these provisions of the statute are consistent with the overall limits on Commission authority. Section 206 covers only complaints relating to rates, terms, and conditions or service charged "by any public utility."[39] Similarly, Section 306 allows complaints against "licensee[s], transmitting utilit[ies], or public utilit[ies]."[40] NextEra has failed to properly invoke either section here. NextEra, not PG&E, is the "public utility" under the relevant PPAs because NextEra is the entity making wholesale sales. PG&E is NextEra's customer, and nothing in the text of Section 206 or Section 306 permits public utilities to file complaints against customers.

To be clear, PG&E is a public utility under the FPA. But that status does not authorize the complaint here. PG&E's public utility status is due solely to activities that are entirely separate

---

[36] 104 FERC ¶ 61,210 (2003). As discussed below and acknowledged by the Commission, *NRG* was premised on a flawed understanding of the relationship between the Bankruptcy Code and the FPA. *See Calpine*, 114 FERC ¶ 61,003 at PP 11, 13.

[37] *NRG*, 104 FERC ¶ 61,210 at PP 1–2.

[38] *Blumenthal v. NRG Power Mktg., Inc.*, 103 FERC 61,344, P 53 (2003) (emphasis added).

[39] 16 U.S.C. § 824e(a).

[40] *Id.* § 825e.

and distinct from the allegations made in NextEra's Complaint, all of which involve PG&E acting in its capacity as an electricity purchaser. Moreover, as noted, Section 206 permits complaints only for rates charged "*by* any public utility," and NextEra's complaint does not complain of any charges collected *by* PG&E.[41] Likewise, Section 306 permits complaints against public utilities only where the complaint alleges an action or omission "in contravention of the provisions of" the FPA.[42] Because the FPA does not restrict—and does not give Commission the authority to restrict—an electricity purchaser's conduct no matter their public utility status, PG&E is not and cannot be "in contravention of the provisions of" the FPA that NextEra has identified.

The Commission's Rules reflect this same limitation. The Complaint purports to be authorized under Rules 206 and 207.[43] Although Rule 206 permits "[a]ny person" to file a complaint "against any other person,"[44] the Commission made clear that it did not seek to expand the scope of its authority under the statute:

> Moreover, the present rule speaks only of complaints against licensees, utilities, and natural gas companies, while the new rules permit complaints against any person violating any statute, rule, order, or other law under which the Commission has or may have jurisdiction. The Commission's authority is necessarily limited to that provided by statute. It should be noted, in this regard, that the new rule merely takes cognizance of the fact that these rules will also govern proceedings under statutes other than the Natural Gas Act and the Federal Power Act.[45]

The relevant statutory language in Section 306 makes clear that the Commission can only authorize complaints against public utilities that are "in contravention of the provisions of" the FPA.[46] Nor

---

[41] *Id.* § 824e(a) (emphasis added).

[42] *Id.* § 825e.

[43] 18 C.F.R. § 385.206.

[44] *Id.* § 385.206(a).

[45] Revisions of Rules of Practice & Procedure to Expedite Trial-Type Hearings, 47 Fed. Reg. 19,014, 19,016 (May 3, 1982).

[46] 16 U.S.C. § 825e.

is the Commission's authority to act on a petition for declaratory relief broader than its jurisdiction otherwise: As FERC has recognized, its authority is "necessarily limited to that provided by statute."[47]

NextEra's theory of jurisdiction here would take the Commission well outside its area of regulatory responsibilities. As the Commission is well aware, numerous Fortune 500 companies, including Apple,[48] Google,[49] and Walmart,[50] have entered into long-term PPAs with power suppliers in order to serve their renewable-energy goals. Accepting NextEra's position here would require the Commission to participate in any bankruptcy of any company with such an arrangement, whether or not the entity is otherwise engaged in the energy business.[51] The Commission's regulatory interests are not served by such a massive expansion of its authority and responsibilities.

---

[47] Revision of Rules of Practice & Procedure to Expedite Trial-Type Hearings, 47 Fed. Reg. at 19,016; *see also Consol. Rail Corp. v. Surface Transp. Bd.*, 571 F.3d 13, 19–20 (D.C. Cir. 2009) (vacating a petition for declaratory order as outside the jurisdiction of the agency); *Tenn. Gas Pipeline Co., L.L.C.*, 143 FERC ¶ 61,128, at P 61 (2013) (noting that one "may not presume the right to do indirectly what one may not do directly.").

[48] *See, e.g.*, Press Release, Apple, Apple Now Globally Powered by 100 Percent Renewable Energy (Apr. 9, 2018), https://www.apple.com/newsroom/2018/04/apple-now-globally-powered-by-100-percent-renewable-energy (noting that Apple "signed a 200-megawatt power purchase agreement for [power from] an Oregon wind farm, the Montague Wind Power Project").

[49] *See* Anmar Frangoul, *Google Says It's the Biggest Corporate Buyer of Renewable Energy on the Planet*, CNBC (Apr. 5, 2018), https://www.cnbc.com/2018/04/05/google-says-its-the-biggest-corporate-buyer-of-renewable-energy-on-the-planet.html (reporting that "Google now had contracts to buy 3 gigawatts of output from renewable energy projects").

[50] *See, e.g.*, Press Release, Walmart, Walmart, SunPower Announce 23-Megawatt Solar Agreement (Oct. 23, 2018), https://news.walmart.com/2018/10/23/walmart-sunpower-announce-23-megawatt-solar-agreement.

[51] Like PG&E, many of these entities are public utilities under the FPA since they have market-based rate tariffs on file with the Commission.

II. JURISDICTION BELONGS IN THE BANKRUPTCY COURT.

The Bankruptcy Code defines with painstaking specificity which types of debt cannot be discharged, and which types of contracts cannot be rejected, through bankruptcy. For example, corporations may not discharge fraudulently obtained debts owed to the United States government or to a person under a claim against the United States government.[52] Tax debts and customs duties that the debtor has fraudulently attempted to evade are also non-dischargeable.[53] The Code similarly limits rejection of certain contracts, like contracts that create obligations to certain regulatory authorities.[54] Yet the Code does not say anything at all to suggest that wholesale electricity contracts are non-dischargeable, nor does it exempt such contracts from rejection.

NextEra nevertheless contends that an exemption for wholesale electricity contracts must be implied in the Bankruptcy Code, because the rejection of such contracts in bankruptcy would infringe upon the Commission's exclusive jurisdiction over wholesale electricity rates.[55] Specifically, NextEra relies on the "filed rate doctrine," which "provides that state law, and some federal law . . . may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by" the Commission.[56]

NextEra's argument fundamentally misunderstands what it means to reject a contract in bankruptcy. Congress, the courts, and the Commission itself have all made clear that rejection of

---

[52] 11 U.S.C.A. § 1141(d)(6)(A); *id.* § 523(a)(2).

[53] *Id.* § 1141(d)(6)(B); *id.* § 523(a)(1).

[54] *See, e.g.*, *id.* § 365(o) (requiring a trustee to assume "any commitment by the debtor to a Federal depository institutions regulatory agency . . . to maintain the capital of an insured depository institution," and granting priority to any claim of a subsequent breach of this obligation); *id.* § 1113 (setting forth requirements for the assumption or rejection of collective bargaining agreements); *id.* § 1169 (providing special treatment for the rejection of a railroad lease).

[55] Compl. at 3–7.

[56] *Id.* at 6–7; *TANC v. Sierra Pac. Power Co.*, 295 F.3d 918, 929 (9th Cir. 2002).

a contract under § 365(a) of the Bankruptcy Code is a generic breach of contract, *not* a change to the contract's filed rate or terms. The plain text of the Bankruptcy Code establishes as much: "[T]he rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease."[57] The Supreme Court has likewise recognized that "rejection constitutes a breach effective immediately before the date of the filing of the [bankruptcy] petition."[58] And the Commission has instructed that contract rejection in bankruptcy "constitutes a *breach* of contract, not approval to terminate [the contract]" under the FPA.[59]

NextEra's position erroneously conflates the *breach* of a contractual obligation with the *modification* of contractual terms. But the Commission and the courts have both recognized a distinction between breach and modification: A party that breaches a contract does not seek to alter the FERC-approved filed rate and performance obligation. To the contrary, non-performance only constitutes a *breach* because there is a continuing obligation to perform, and breach-of-contract damages are predicated upon the filed rate, which forms the plaintiff's expectancy. Accordingly, the Commission has held that the FPA does not provide FERC with exclusive jurisdiction over the breach of Commission-approved contracts.[60] Because breach-of-contract claims do not arise under the Commission's exclusive jurisdiction, the Commission routinely declines to consider such

[57] 11 U.S.C. § 365(g). Although Section 365(g) notes that rejection does not constitute a breach under certain defined exceptions, none of those exceptions apply here.

[58] *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 545 (1984) (citing 11 U.S.C. § 365(g)).

[59] *See Calpine*, 114 FERC ¶ 61,003 at P 13.

[60] *Id.* at PP 8, 11 ("[T]he Commission is precluded from taking action under the FPA that impacts a debtor's ability to reject an executory contract.").

disputes;[61] contract disputes involving alleged breaches of wholesale electricity contracts are instead frequently litigated in state courts.[62]

What is true generally of breaches of wholesale power contracts is equally true of the rejection of such a contract in bankruptcy, which—as described above—is simply the name for a breach of contract by a debtor in bankruptcy. The Fifth Circuit so held in *Mirant*, the only appellate decision to consider the question of whether a bankruptcy contract rejection of a wholesale electricity contract subject to FERC regulation arises under FERC's exclusive jurisdiction[63]—and a decision that the Commission affirmatively chose to follow in *Calpine*.[64] In *Mirant*, the Court of Appeals acknowledged that FERC maintained exclusive authority over modification or abrogation of wholesale contract rates, but held that *rejection* of such a contract was only a contract breach, not an invalidation or erasure of the contract, or a challenge to the contract's filed rate.[65] Contract rejection does not change the filed rate; rather, as the Fifth Circuit found, contract

---

[61] *See, e.g.*, *Cottonwood Wind Project, LLC v. Nebraska Public Power District, Inc.*, 155 FERC ¶ 61,285, at P 27 (2016) (declining to exercise jurisdiction over breach of contract dispute); *Southern Maryland Electric Cooperative, Inc. v. J.P. Morgan Ventures Energy Corporation*, 155 FERC ¶ 61,164, at PP 21, 23 (2016) (same, and noting that "the Commission has generally left [breach of contract damages] to be decided in court.").

[62] *See, e.g.*, *FPL Energy, LLC v. TXU Portfolio Management Co., L.P.*, 426 S.W.3d 59 (Tex. 2014) (reviewing entry of declaratory judgment on breach of contract claim and counterclaim brought by electrical wholesaler and electrical generation facilities); *Matanuska Elec. Ass'n v. Chugach Elec. Ass'n, Inc.*, 152 P.3d 460, 466-67 (Alaska 2007) (holding that state regulatory commission did not have jurisdiction to provide remedies in breach of contract dispute that did not impinge on "the Commission's core area of jurisdiction—changes in rates").

[63] As noted above, the Northern District of Ohio Bankruptcy Court, following *Mirant* and rejecting the district court's decision in *Calpine*, recently held that bankruptcy courts generally have jurisdiction over motions to reject wholesale power contracts. *FirstEnergy Solutions Corp.*, 2018 WL 2315916, at *12–*16. An appeal of this decision has been filed before the Sixth Circuit; opening briefing is due in February of 2019. *See In re FirstEnergy Solutions Corp.*, Nos. 18-3787/18-3788/18-4095/18-4097/18-4107/18-4110, Doc. No. 30 (6th Cir. Jan. 17, 2019).

[64] *See Calpine*, 114 FERC ¶ 61,003 at PP 8–11. The Commission adopted *Mirant*'s rationale and conclusions even though it had previously "reached a different result." *Id.* at P 11.

[65] *Mirant*, 378 F.3d at 519–22.

rejection damages are calculated *using* the filed rate.[66] The Court thus reasoned that "[a] motion to reject an executory power contract is not a collateral attack upon that contract's filed rate because that rate is given full effect when determining the breach of contract damages resulting from the rejection."[67] Importantly, *Mirant*'s holding was informed by the structure and purpose of the Bankruptcy Code: Though Congress detailed numerous limitations on and exceptions to contract rejection under Section 365(a) of the Bankruptcy Code—enacted 58 years after the FPA—the Court noted that Congress did not limit a utility's ability to reject a wholesale electric contract subject to FERC jurisdiction.[68]

Mirant was correctly decided. It reflects the appellate court's full consideration of the FPA's intention to carefully limit the Commission's exclusive jurisdiction to matters within its unique expertise—*i.e.*, matters that question the justness and reasonableness of a filed rate—and the critical distinction between such matters and contract rejections, which do not raise such questions.[69] The Commission's decision to affirmatively follow *Mirant*—and thus to depart from its own contrary precedent[70]—is testament to its correctness. In *Calpine*, the Commission noted that, prior to *Mirant*, it had ordered a public utility to perform under a contract, even though the utility had secured a rejection of that contract in bankruptcy court.[71] Upon thorough consideration

---

[66] *Id.* at 519–20.

[67] *Id.* at 522.

[68] *Id.* at 521–22.

[69] NextEra claims that *Mirant* "relies heavily on Fifth Circuit precedent," Compl. at 11, but this is not so. *Mirant* is based on the plain text of the Bankruptcy Code and the Supreme Court's decision in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981), as well as its prior decision in *Gulf States Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465 (5th Cir. 1987). *See Mirant*, 378 F.3d at 519–22. And even if *Mirant* did rely "heavily" on *Gulf States*, that reliance is no reason not to follow them here, given that both Fifth Circuit decisions are well-reasoned, thorough appellate opinions.

[70] *See NRG*, 104 FERC ¶ 61,210 at PP 1–2.

[71] *Calpine*, 114 FERC ¶ 61,003 at P 7.

of *Mirant*'s reasoning, the Commission independently determined that contract rejection was a "*breach* of contract," not an action that would erase the party's liability to its counterparty.[72] The Commission thus concluded that its prior decision requiring Commission approval of contract rejections was wrong: Because contract rejections are distinct from modifications to the filed contractual rate, the latter fall within the Commission's exclusive jurisdiction and require approval, while the former do not.[73]

NextEra's attacks on *Mirant* erase this basic distinction between an action to change a contract's terms, and a breach of contract action seeking damages for breaking a contract's terms. For example, NextEra asserts that rejection "terminates the contract before the agreed upon term has expired," and thus "effectively amends or modifies the obligation to deliver wholesale power for the term of the contract."[74] This is wrong. Rejection does not amend or modify the obligation to perform under the contract, or otherwise reset the term or conditions for performance; it simply amounts to notice that a party will not perform as required by the contract, thereby breaching its obligations[75]—leaving the counterparty with a claim for damages for the unfulfilled performance of the contract's full term. The counterparty in a contract rejection has a claim for damages precisely because the contract is *not* terminated early. If NextEra were right, and breaching a contract constituted the contract's termination, then the counterparty would be left without any claim at all.

NextEra also argues that the procedure by which the counterparty must assert its breach of contract claim—*i.e.*, by lodging an unsecured claim against the bankruptcy estate—has a direct

[72] *Id.* at PP 8, 13.

[73] *Id.* at PP 11, 13.

[74] Compl. at 12.

[75] *See* 11 U.S.C. § 365(g).

effect on the wholesale rate because “there is a substantial risk” that the counterparty will recover a rate that is different from the filed rate.[76] This, too, is wrong, because, even if a party elects to reject a contract under the Bankruptcy Code, the unsecured claim is for the full amount of the performance obligation under the wholesale contract, calculated using the Commission-approved filed rate. The counterparty may recover that amount in full, or it may recover less than that amount if the bankrupt party does not have sufficient assets to cover the claim, but the latter possibility has nothing at all to do with the *rate* used to calculate the claim.

NextEra next argues that, as a matter of policy, rejections of wholesale contracts in bankruptcy court will “adversely impact th[e] Commission’s ability to promote rate certainty,” which will, in turn, hinder investment.[77] But the threat of a contract’s rejection in bankruptcy is simply a risk of entering into any contract, whether for wholesale electricity or otherwise, and nothing in the FPA or Commission precedent purports to protect contracting parties from this risk. Indeed, NextEra’s policy arguments are contradicted by its own conduct. It entered the contracts at issue *after* the *Mirant* decision and after the Commission’s guidance order in *Calpine*. *Calpine*, moreover, was decided twelve years ago. If the threat of contract rejection were really sufficient to chill investment, NextEra would be able to offer actual evidence in support of its claim. Yet it has offered nothing beyond unsubstantiated assertion.

NextEra points to two district court decisions that it claims undermine *Mirant*.[78] The first, *In re Calpine Corp.*,[79] simply assumes, without offering citation or explanation, that contract rejection would “alter[ ] the rates, terms, conditions, or duration of the contracts” in a manner

[76] Compl. at 13.
[77] *Id.* at 14–15.
[78] Compl. at 10–11.
[79] 337 B.R. 27 (S.D.N.Y. 2006).

requiring "FERC involvement and approval."[80] According to the district court, rejection is different from a "run-of-the-mill contract dispute" because it involves "a complete cessation of performance."[81] That distinction makes little sense. Many "run-of-the-mill contract dispute[s]" likewise involve cessations of performance. The court also claimed to find "little evidence of congressional intent to limit FERC's regulatory authority" in the Bankruptcy Code.[82] But that gets matters backwards. The Bankruptcy Code comprehensively sets forth which obligations may be rejected in bankruptcy, and which may not. NextEra is claiming an exception to the Code found nowhere in the statutory text. Congress "[o]bviously . . . knew how to draft an exclusion" from Section 365's contract rejection provisions in the Code,[83] and thus Section 365 "by its terms includes all executory contracts except those expressly exempted."[84]

The second decision cited by NextEra, *In re Boston Generating*,[85] is even less persuasive. NextEra claims that, in this unpublished decision, the court held that the debtors were required to obtain approval from the Commission of a contract's abrogation, and that if the Commission declined such approval, the debtors could not reject the contract.[86] But that was not a holding of the court; instead, the parties jointly "agree[d]" that they should seek Commission approval.[87] This

---

[80] *Id.* at 33.

[81] *Id.* at 36.

[82] *Id.* at 33.

[83] *Bildisco*, 465 U.S. at 522–23.

[84] *Id.* at 521; *see also Mirant*, 378 F.3d at 521–22. NextEra inverts this basic canon of statutory construction to argue that the Bankruptcy Code actually shows Congress's intent to extend the Commission's exclusive jurisdiction over contract rejections, because Congress "most likely would have" affirmatively stated in the Code its intent to "divest[] the Commission" of its authority to regulate wholesale rates. Compl. at 14. But this argument is clearly irreconcilable with *Bildisco*'s recognition that Congress included, in the Bankruptcy Code, all exceptions to contract rejection that it intended to make. *See Bildisco*, 465 U.S. at 521–23

[85] No. 10 Civ. 6528, 2010 WL 4616243 (S.D.N.Y. Nov. 12, 2010).

[86] Compl. at 11.

[87] *Boston Generating*, 2010 WL 4616243, at *3.

decision thus in no way undermines *Mirant* or its reasoning—particularly in light of the numerous instances in which courts have considered breach-of-contract claims involving wholesale electricity contracts.

Finally, NextEra speculates that the Ninth Circuit would split from *Mirant*, because the Circuit "has extensive precedent applying the filed rate doctrine to deny collateral attacks on the Commission's exclusive jurisdiction to regulate wholesale power contracts."[88] NextEra's speculation again rests on the same categorical mistake that infects its entire pleading: the conflation of contract breaches with contract modifications. Every case cited by NextEra stands for the uncontested proposition that the Commission maintains exclusive jurisdiction over claims that seek to change a filed rate for unfairness or unreasonableness, and that courts lack jurisdiction over such claims, even when they are styled as contractual disputes.[89] These cases are thus wholly consistent with *Mirant*, which found that contract rejection did *not* fall within the Commission's exclusive jurisdiction because rejection did *not* seek to change the filed rate.

To the extent that the cases offer any insight into how the Ninth Circuit would regard *Mirant*, they suggest the opposite of what NextEra claims. For example, *TANC v. Sierra Pacific Power Co.*,[90] which NextEra suggests rejects the Fifth Circuit's decision in *Gulf States Utilities*

[88] Compl. at 11–12.

[89] *See Wah Chang v. Duke Energy Trading & Mktg., LLC*, 507 F.3d 1222, 1224, 1227 (9th Cir. 2007) (finding claim that filed rate was unfair barred by filed-rate doctrine and preempted); *Pub. Util. Dist. No. 1 of Snohomish Cty. v. Dynegy Power Mktg., Inc.*, 384 F.3d 756, 758, 761–62 (9th Cir. 2004) (same, and that claim was preempted); *Pub. Util. Dist.t No. 1 of Grays Harbor Cty. v. IDACORP Inc.*, 379 F.3d 641, 645–46, 648, 650, 651 (9th Cir. 2004) (same, because relief sought would require court to assess the "fair price" of electricity under the contract at issue); *TANC*, 295 F.3d at 929–32 (finding that contract claims dependent on "assumption that, but for the misdeeds of the utility company defendants," FERC would have allocated electricity transmission capacity differently, ran afoul of the filed-rate doctrine).

[90] 295 F.3d 918 (9th Cir. 2002).

Co. v. Alabama Power Co.,[91] actually affirms *Gulf States* and its application here: In *TANC*, the Ninth Circuit observed that the contract claims in *Gulf States* were not preempted by the filed-rate doctrine because the claims concerned the quantity of electricity required under a contract, a matter that "was not within the ambit of federal regulation."[92] Contract rejection in bankruptcy is similarly not a matter "within the ambit of federal regulation" by the Commission, because it does not modify the filed rate.[93]

III. EVEN ACCEPTING THE COMMISSION'S SIXTH CIRCUIT LITIGATING POSITION, JURISDICTION RESTS WITH THE BANKRUPTCY COURT

A. The Commission Should Disclaim Jurisdiction Over the PPAs in Question.

PG&E recognizes that the Commission has chosen to abandon its prior precedent in the *FirstEnergy* litigation pending in the Sixth Circuit. But even accepting the Commission's litigation precedent, the bankruptcy court still would have jurisdiction over the particular contracts at issue here. And the terms of the contract also mandate that the parties arbitrate any dispute over the contracts. NextEra must first seek to raise its concerns through arbitration and may only seek relief from FERC, if at all, after otherwise complying with the terms of the PPAs at issue.

The Commission's litigation position in that case rested on two assumptions. First, the Commission argued that it possessed a heightened interest in the contracts because they were subject to *Mobile-Sierra* protection.[94] Second, the Commission believed that "concurrent

---

[91] 824 F.2d 1465 (5th Cir. 1987); *see* Compl. at 12.

[92] *TANC*, 295 F.3d at 932.

[93] FERC's exclusive jurisdiction over the reasonableness of wholesale rates is implicated when a district court is "expressly required to assume a hypothetical rate different from that actually set by FERC" in order to resolve legal claims—it is not implicated by more basic contract law questions such as "whether there is a contract" or "whether there was a contract formation problem." *IDACORP*, 379 F.3d at 648–49.

[94] *See* FERC *FirstEnergy* Brief at 7–9.

jurisdiction"[95] would be straightforward to implement because it was possible for the "Debtors [to] concurrently seek approval from FERC to modify the PPAs."[96]

These premises are not satisfied in this case. Every single NextEra contract either expressly disclaims *Mobile-Sierra* protection, or includes a waiver provision under which the parties agreed they would not ask the Commission to modify the contracts.

First, many of the NextEra contracts are not subject to *Mobile-Sierra*. Instead they adopt a more deferential standards of review. For example, the North Sky River PPA states that:

> The standard of review the FERC shall apply when acting on proposed modifications to this Agreement, either on FERC's own motion or on behalf of a signatory or a non-signatory, shall be the "just and reasonable" standard of review rather than the "public interest" standard of review.[97]

The Commission routinely approves contractual provisions of this type.[98]

To the extent PPAs include such clauses, they have a significantly different status than the agreements at issue in the *FirstEnergy* litigation, as well as other cases predating *Mirant* which the Commission's brief has cited. For example, in the *NRG* litigation, the Commission held that it was required to review the rejection of contracts by a seller in bankruptcy (a position it repudiated after *Mirant*). That decision, though, rested centrally on the fact that the agreements were subject

---

[95] *Id.* at 1, 17. Although the Commission uses the term "concurrent jurisdiction," that description is not accurate. If two bodies have concurrent jurisdiction, then either has the power to act. What the Commission actually invokes is serial exclusive jurisdiction: that the bankruptcy court may not act alone, but instead depends upon Commission action to exercise its rejection power.

[96] *Id.* at 21.

[97] Exhibit F § 10.13 (North Sky River Energy, LLC). The following PPAs have similar provisions: Exhibit A § 10.13 (Desert Sunlight Holdings, LLC); Exhibit E § 10.13 (Vasco Winds, LLC); and Exhibit H § 10.13 (NextEra Energy Montezuma Wind II, LLC).

[98] *See, e.g.*, *Green Power Express LP*, 135 FERC ¶ 61,141, at PP 66, 75, 79 (2011) (approving settlement agreement including provision requiring Commission to apply just and reasonable standard of review, and not public interest standard, when acting on proposed modifications to settlement and changes to tariff sheets proposed by non-party or by the Commission).

to *Mobile-Sierra* protection.[99] Similarly, in the *FirstEnergy* litigation, the Commission relies on the Southern District of New York decisions discussed above,[100] but each of those cases assumes that the *Mobile-Sierra* public interest standard applies.[101]

In its Complaint, NextEra thus seeks a significant expansion of the jurisdictional conflict between the Commission and the bankruptcy court. Rather than limit the potential conflict to cases involving *Mobile-Sierra* where the Commission has been required to take a particular interest in contractual certainty, NextEra seeks to displace bankruptcy jurisdiction for *any* Commission-jurisdictional contract regardless of the standard of review under the FPA. Neither the Commission nor any court has ever endorsed such a broad theory of jurisdictional displacement. The Commission should not do so in this proceeding.

Second, to the extent that some of the PPAs do invoke the protections of *Mobile-Sierra*, that invocation is accompanied by a waiver provision. Under these clauses, the parties agreed not to seek to modify the agreements under the FPA. For example the PPA with FPL Energy Montezuma Wind LLC states that:

> It is the express intent of the Parties that the rates and all other terms and conditions of the services provided hereunder shall remain in effect for the Term and that such rates, terms and conditions shall not be subject to change under Sections 205 or 206 of the Federal Power Act of 1935, 16 U.S.C. § 791 et seq., (or any successor legislation) without the written consent of both Parties, notwithstanding any subsequent changes in applicable Law or market conditions that may occur. Each Party agrees that, except with the prior written consent of the other Party, neither it nor its Affiliates, successors and permitted assigns will institute or voluntarily

---

[99] *NRG*, 104 FERC ¶ 61,210 at PP 57–61 (applying *Mobile-Sierra* to prevent rejection in bankruptcy).

[100] *See* FERC *FirstEnergy* Brief at 20–22.

[101] *In re Boston Generating, LLC*, No. 10 Civ. 6258, 2010 WL 4616243 at *1 (S.D.N.Y. Nov. 12, 2010) ("In order to reject the contract, the Debtors must also obtain a ruling from FERC that abrogation of the contract does not contravene the public interest."); *In re Calpine Corp.*, 337 B.R. 27, 33 (S.D.N.Y. 2006) (describing the public interest standard); *In re NRG Energy, Inc.*, No. 03 Civ. 3754, 2003 WL 21507685, at *4 (S.D.N.Y. June 30, 2003) (noting the Commission's obligation to apply the public interest standard).

> cooperate, directly or indirectly (through complaint, investigation or otherwise), in the institution or conduct of any action or proceeding of the FERC under Section 205, Section 206 or any other portion of the Federal Power Act, which action or proceeding is intended to change the rates, terms and conditions of this Agreement then in effect.[102]

The Commission has held that parties have the ability to waive their filing rights in this fashion, although the Commission always retains the authority under Section 206 to modify the agreement applying the *Mobile-Sierra* standard.[103]

These contractual provisions represent a choice by the parties. They have opted to resolve their disputes without litigation at FERC and without resort to the provisions of the FPA. Allowing the resolution of these disputes in a bankruptcy is consistent with the choice made when the agreements were drafted. The Commission should respect this choice of forum by the parties.

NextEra's Complaint requests that the Commission require PG&E to seek "approval from this Commission to abrogate or amend the contract pursuant to sections 205 or 206 of the FPA."[104] These contract provisions may stand as an obstacle to that procedure since NextEra has agreed that such a process *will not* be followed to modify the agreements. These waiver provisions themselves are likely also protected by *Mobile-Sierra*. Under NextEra's view, then, no clear path exists for parties to breach these contracts. The Commission should not adopt a view of its own authority that leads to such a result.

---

[102] Exhibit G § 10.15(b) (FPL Energy Montezuma Wind, LLC). The following agreements have similar provisions: Exhibit B § 10.16 (Shafter Solar, LLC); Exhibit C § 11.12(b) (Genesis Solar, LLC); Exhibit D § 10.16 (Westside Solar, LLC).

[103] *Calpine Oneta Power, L.P. v. Am. Elec. Power Serv. Corp.*, 112 FERC ¶ 61,186, at P 5, n.3 (2005); *see also Pub. Serv. Co. of Okla.*, 146 FERC ¶ 61,006, at PP 6, 10 (2014) (accepting for filing operating agreement waiving contracting parties' right to seek changes to the agreement under Sections 205 and 206 absent written agreement); *El Paso Elec. Co.*, 136 FERC ¶ 61,150, at PP 2, 4 (2011) (approving settlement agreement including waiver of filing right).

[104] Compl. at 3.

The Commission can adopt these limitations on its jurisdiction under the FPA without disturbing its litigation position in the *FirstEnergy* proceeding. The OVEC agreement at the center of that case is substantively different from the PPAs here. The parties to that agreement chose 1) to apply the *Mobile-Sierra* standard to their agreement and 2) not to waive the right to file challenges to the agreement at the Commission.[105] Thus, the two assumptions underlying the Commission's position in that litigation are true of the OVEC agreement even though they do not apply here.

As outlined above, PG&E believes that the Commission should change its view, apply *Mirant*, and defer to the bankruptcy court. However, the Commission need not reach the difficult question of how to treat a contract where the parties choose 1) to apply *Mobile-Sierra* while 2) preserving the option to litigate matters at FERC. Here it can simply decide that if either factor is absent, bankruptcy court jurisdiction is appropriate.

B. The Commission Should Decline to Exercise Any Jurisdiction It Possesses.

Even if the Commission is correct and it has concurrent jurisdiction with the bankruptcy court, it should decline to exercise that jurisdiction. The Commission has long recognized that in cases of contract disputes, the Commission has discretion to decline to exercise its jurisdiction when resolution in another forum is more appropriate.[106] In determining whether to take jurisdiction, the Commission applies a three-part test and asks 1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission

[105] Complaint or, in the Alternative, Request for Declaratory Order, *Ohio Valley Elec. Corp. v. FirstEnergy Solutions Corp.*, No. EL18-135, Attachment A, Section 9.09 at 19.

[106] *See, e.g.*, *Cottonwood Wind Project, LLC v. Neb. Pub. Power Dist., Inc.*, 155 FERC ¶ 61,285, at PP 27–28 (2016) (declining to exercise jurisdiction over breach of contract dispute); *S. Md. Elec. Coop., Inc. v. J.P. Morgan Ventures Energy Corp.*, 155 FERC ¶ 61,164, at PP 21, 23 (2016) (same).

decision; 2) whether there is a need of uniformity of interpretation of the type of question raised by the dispute; and 3) whether the case is important in relation to the regulatory responsibilities of the Commission.[107]

In this case, all of these considerations are absent. *First*, there is no aspect of this dispute that draw on the special expertise of the Commission. This case does not require the interpretation of technical language.[108] To the extent that the contractual language here will matter at all, only the provisions relating to default and damages are likely to be at issue. The Commission has held that it "does not have special expertise in the area of determining damages for claimed breaches of contract, and the Commission has generally left this issue to be decided in court."[109] Similarly, the Commission did not approve or mandate the language of these contracts. This case involved negotiated contracts, rather than *pro forma* provisions or the interpretation of tariffs.[110]

Second, an exercise of Commission jurisdiction cannot create uniformity here. It can only destroy it and generate regulatory uncertainty. An assertion of jurisdiction would create a split in authority that would destroy a preexisting consensus. The Commission may disagree, but courts have already spoken on this issue. In particular, *Mirant* will remain binding precedent in the Fifth Circuit whatever the Commission concludes here. NextEra is seeking to have the Commission disrupt that consensus and create different rules for bankruptcies across the country. That outcome would conflict with the goals of the FPA and the Bankruptcy Code.[111]

---

[107] *Ark. La. Gas Co. v. Hall*, 7 FERC ¶ 61,175 at 61,322.
[108] *S. Md. Elec. Coop., Inc.*, 155 FERC ¶ 61,164 at P 22.
[109] *Id.* at P 23.
[110] *Id.* at P 24, n.33.
[111] U.S. Const. art. I, § 8 (providing Congress the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States").

NextEra claims that allowing bankruptcy courts to reject wholesale power contracts will create uncertainty and impede the development of new supplies.[112] In fact, NextEra's litigation position is the one that will create regulatory uncertainty. Since *Mirant*, the law has been clear and stable. Like every commercial counterparty, entities entering into wholesale power contracts might be subject to rejection of those contracts in bankruptcy. Creating uncertainty about that result does not serve the public interest.

In effect, NextEra proposes to create a race to the courthouse. Given the result in *Mirant* and the FirstEnergy litigation, granting their complaint lead to an untenable situation where the party to file first gets to pick the forum. Parties seeking to preserve bankruptcy jurisdiction will be able to seek and enforce an injunction to prevent the Commission from acting while parties preferring Commission jurisdiction will seek to file at the agency. That result does not serve the interests of either the Commission or bankruptcy courts.

Third, these cases are not important to the Commission's regulatory responsibilities. This is, at most, a commercial dispute between a seller of wholesale power and a buyer. The parties indisputably could have modified or cancelled this agreement without any Commission input or approval. Because the parties could *voluntarily* terminate the obligations, the only potential concern with termination *in bankruptcy* is NextEra's interest as a creditor. That commercial interest of a specific entity is not a sufficient reason for the Commission to exercise jurisdiction, especially where the interests of other creditors may be impacted. To the extent that the Commission retains some limited interest in the proceeding, it can express its views in the bankruptcy proceeding.

Moreover, the agreements themselves all highlight the extent to which this matter does not

[112] Compl. at 15.

involve an issue of particular regulatory concern to the agency. Each agreement includes a forum selection provision that recognizes that disputes may be resolved in arbitration.[113] The parties have thus made clear that their interests can be fully satisfied in a resolution that does not even involve proceedings in court, let alone proceedings before the Commission.

In contrast, NextEra's own petition shows why the regulatory concerns of the bankruptcy court are significant here and far outweigh the concerns of the Commission. The petition argues that rejection of the contracts would not benefit the estate and might harm the interests of other claimants in bankruptcy.[114] That analysis, though, of the impact of any rejection of the contracts on the bankruptcy estate lies far outside the expertise and regulatory responsibilities of the Commission. Instead, it falls directly within the expertise of the bankruptcy court and requires interpretation of the Bankruptcy Code, not the FPA.

COMMUNICATIONS

Correspondence and communications with respect to this filing should be sent to, and PG&E requests that the Secretary include on the official service list, the following individuals:

William Manheim
Charles R. Middlekauff
PACIFIC GAS AND ELECTRIC COMPANY
77 Beale Street
San Francisco, California 94105
(415) 973-6628
WVM3@pge.com
CRMd@pge.com

[113] *See* Exhibit A § 12.3 (Desert Sunlight Holdings, LLC); Exhibit B §§ 12.3–12.4 (Shafter Solar, LLC); Exhibit C § 13.4 (Genesis Solar, LLC); Exhibit D § 12.3 (Westside Solar, LLC); Exhibit E §§ 12.3–12.4 (Vasco Winds, LLC); Exhibit F §§ 12.3–12.4 (North Sky River Energy, LLC); Exhibit G § 12.4 (FPL Energy Montezuma Wind, LLC); and Exhibit H §§ 12.3–12.4 (NextEra Energy Montezuma Wind II, LLC).

[114] Compl. at 14–15.

CONCLUSION

For these reasons, PG&E respectfully requests that the Commission deny the Complaint.

January 22, 2019

Respectfully submitted,

/s/ William Manheim

William Manheim
Charles R. Middlekauff
PACIFIC GAS AND ELECTRIC COMPANY
77 Beale Street
San Francisco, California 94105
(415) 973-6628
WVM3@pge.com
CRMd@pge.com

CERTIFICATE OF SERVICE

I hereby certify that I have caused an electronic copy of this Answer and associated Exhibits to be served upon each person designated in the official service list compiled by the Secretary in this proceeding.

Dated at San Francisco, California on January 22, 2019.

/s/ Amy S. Yu

Amy S. Yu
PACIFIC GAS AND ELECTRIC COMPANY
77 Beale Street
San Francisco, California 94105
(415) 973-6628
ASY2@pge.com